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Case No.: 369200

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MAXIM HEALTHCARE SERVICES, INC.,

Appellant,

v.

KATHRYN TAYLOR,

Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
A. First Assignment of Error	2
B. Second Assignment of Error	3
C. Third Assignment of Error	3
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
IV. STATEMENT OF THE CASE	4
A. Procedural Posture	4
B. Statement of Facts	6
1. Testimony of Kathryn Taylor	6
2. Testimony of Scott Shawen, M.D.	8
3. Testimony of Daniel Schmidt, D.O.	10
4. Testimony of Patrick Lynch, M.D.	11
5. Testimony of Eric Hofmeister, M.D.	14
6. Testimony of Douglas Porter, M.D.	16
V. ARGUMENT	18
A. Standard of Review	18
B. The Superior Court Failed to Apply the Correct Legal Standard for this “Lighting Up” Claim and Made Findings Against the Weight of the Record	19

1.	The Superior Court did not apply the legal standard.	20
2.	Ms. Taylor’s preexisting right hip degenerative joint disease was symptomatic prior to the November 2011 industrial injury.	21
3.	Ms. Taylor's preexisting right hip degenerative joint disease would have continued to progress regardless of the November 2011 industrial injury.	25
C.	The Superior Court Erred in Its Application of the Rule Requiring Special Consideration for the Attending Physician’s Opinion.	27
D.	Proximate Cause was Not Established Between the November 2011 Industrial Injury and the Subsequent Right Hip Replacement Surgery.	30
VI.	CONCLUSION.....	33

TABLE OF AUTHORITIES

	Page
CASES	
<i>Allison v. Dep't of Labor & Indus.</i> , 66 Wn.2d 263, 401 P.2d 982 (1965).....	24
<i>Austin v. Dep't of Labor & Indus.</i> , 6 Wn. App. 394, 492 P. 2d 1382 (1971).....	20, 22, 25
<i>Baughn v. Honda Motor Co.</i> , 107 Wn.2d 127, 727 P.2d 655 (1986).....	31
<i>Chalmers v. Dep't of Labor & Indus.</i> , 72 Wn. 2d. 595, 434 P.2d 720 (1967).....	28, 29, 30
<i>Ehman v. Dep't of Labor and Indus.</i> , 33 Wn.2d 584, 206 P.2d 787 (1949).....	18
<i>Energy Northwest v. Harje</i> , 148 Wn. App. 454, 199 P.3d 1043 (2009).....	18, 21
<i>Groff v. Dep't of Labor & Indus.</i> , 65 Wash.2d 35, 395 P.2d 633 (1964))	28
<i>Hamilton v. Dep't of Labor & Indus.</i> , 111 Wn.2D 569, 761 P.2d 618 (1988)).....	28
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999).....	31
<i>Jenkins v. Weyerhaeuser Co.</i> , 143 Wn. App. 246, 177 P.3d 180 (2008).....	18, 24
<i>Matson v. Dep't of Labor & Indus.</i> , 198 Wash. 507, 88 P.2d 825 (1939).....	20
<i>Miller v. Dep't of Labor & Indus.</i> , 200 Wash. 674, 94 P.2d 764 (1939).....	20, 25

<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	18, 21
<i>Simpson Logging Co. v. Dep't of Labor & Indus.</i> , 32 Wn.2d 472, 202 P.2d 448 (1949).....	31
<i>Spalding v. Department of Labor & Indus.</i> , 29 Wash.2d 115, 186 P.2d 76 (1947).....	28
<i>Stampas v. Dep't of Labor and Indus.</i> , 38 Wn.2d 48 (1951)	31
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	24
<i>Wendt v. Dep't of Labor & Indus.</i> , 18 Wn. App. 674, 571 P.2d 229 (1977).....	31
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 913 P.2d 402 (1996).....	18
<i>Zavala v. Twin City Foods</i> , 185 Wn. App. 838, 343 P.3d 761 (2015).....	20, 22, 25

STATUTES

RCW 51.52.140	18
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I. INTRODUCTION

This workers' compensation case pertains to whether a preexisting right hip degenerative conditions was permanently aggravated or "lit up" by an industrial injury resulting in the subsequent need for a right hip replacement surgery. In November 2011, Ms. Taylor suffered an industrial injury while working for Maxim Healthcare Services. She had preexisting degenerative right hip disease and had received treatment for her right hip symptoms for years before the November 2011 industrial injury, including four days prior to the injury. In May 2013, Ms. Taylor had arthroscopic surgery on her right hip for a labral tear. After recovering from that surgery, she returned to work for another employer. In October 2014, she suffered an injury to her right hip. When she needed bilateral hip replacements in 2016-2017, Ms. Taylor sought to tie her *right* hip replacement surgery back to the 2011 injury, arguing that injury "lit up" the preexisting degeneration. The Board of Industrial Insurance Appeals disagreed, and she appealed.

The Spokane Superior Court reversed, finding Ms. Taylor's November 2011 industrial injury permanently aggravated her preexisting right hip degenerative joint disease and finding Maxim Healthcare Services responsible for her total right hip replacement. In reaching this conclusion, the judge failed to apply the correct legal standard for lighting

up or aggravation of a preexisting condition, failed to rely on substantial evidence in finding Ms. Taylor's right hip was asymptomatic at the time of injury, failed to rely on substantial evidence regarding the natural progression of Ms. Taylor's degenerative hip condition, incorrectly applied the legal standard for special consideration of an attending provider's opinion, and failed to address whether proximate cause was properly established between the November 2011 industrial injury and Ms. Taylor's subsequent right hip replacement. Therefore, the Superior Court's decision should be reversed, and this Court should find as a matter of law that the November 2011 industrial injury did not permanently aggravate Ms. Taylor's preexisting right hip degenerative joint disease, and that Maxim Healthcare Services is not responsible for Ms. Taylor's total right hip replacement.

II. ASSIGNMENTS OF ERROR

A. First Assignment of Error

The Superior Court erred when it entered Conclusions of Law 3 and 5 stating that the November 2011 industrial injury permanently aggravated Ms. Taylor's preexisting right hip degenerative joint disease. The correct legal standard for permanent aggravation was not applied and substantial evidence did not support the conclusions.

B. Second Assignment of Error

The Superior Court erred when it entered Finding of Fact 16 according special consideration to Dr. Lynch's testimony. The legal standard for special consideration of an attending physician's opinion was not correctly applied.

C. Third Assignment of Error

The Superior Court erred when it entered Conclusions of Law 4 and 5 finding Maxim Healthcare Services responsible for the total right hip replacement. The legal standard for proximate cause was not established and substantial evidence did not support the conclusions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court fail to apply the correct legal standard to determine if Ms. Taylor's preexisting right hip degenerative condition was permanently aggravated or "lit up" by the November 2011 industrial injury? (Assignment of Error 1).
2. Did the Superior Court fail to rely on a preponderance of the evidence, and make a finding lacking in substantial evidence, when it concluded Ms. Taylor's right hip degenerative condition was asymptomatic before the November 2011 industrial injury? (Assignment of Error 1).

3. Did the Superior Court error in wholly failing to address the natural progression of Ms. Taylor's preexisting right hip degenerative condition? (Assignment of Error 1).
4. Did the Superior Court misapply the attending physician special consideration standard? (Assignment of Error 2).
5. Did the Superior Court's reliance on Dr. Lynch lack substantial evidence when it weighed his opinion more heavily despite his clear lack of full information? (Assignment of Error 2).
6. Did the Superior Court fail to apply the correct legal standard to determine if proximate cause was established between the November 2011 industrial injury and the subsequent right hip replacement surgery? (Assignment of Error 3).

IV. STATEMENT OF THE CASE

A. Procedural Posture

Kathryn Taylor sustained an industrial injury on November 15, 2011; the Department of Labor and Industries ("Department") allowed the

claim on August 5, 2013. CBR 77¹. On January 26, 2017, the Department issued an Order and Notice finding the self-insured employer, Maxim Healthcare Services (“Maxim”), responsible for permanent aggravation of degenerative joint disease of the right hip and directing Maxim to authorize and pay for the total right hip replacement surgery. CBR 98. On April 17, 2017, the Department affirmed the January 26, 2017 Order. CBR 100. Maxim timely filed an appeal of the Department’s Order and Notice on May 15, 2017.

The Board granted Maxim’s appeal and a hearing was held on June 6, 2018. CBR 129. On September 28, 2018, the Industrial Appeals Judge issued a Proposed Decision and Order reversing the Department Order and Notice, finding and concluding the November 2011 industrial injury did not aggravate Ms. Taylor’s preexisting degenerative joint disease of the right hip and was not the proximate cause of the need for a right hip replacement surgery. CBR 64. Ms. Taylor filed a timely Petition for Review with the Board. CBR 21-46. Maxim filed a response. CBR 5-19. On November 29, 2018, the Board denied Ms. Taylor’s petition and

¹ “CBR” refers to the administrative Board transcript, the “Certified Board Record,” that is filed with the Superior Court by the Board of Industrial Insurance Appeals, and which was filed with this Court by the Superior Court separate from the Clerk Papers. The number following the CBR citation is the page number where the fact can be referenced, and the line number from the transcript may be referenced as indicated.

adopted the Proposed Decision and Order as the Final Order of the Board with one correction. CBR 4.

On December 18, 2018, Ms. Taylor appealed the Board Order to Spokane Superior Court. CP 1-2. A bench trial was held on April 12, 2019 before the Honorable John O. Cooney. Judge Cooney issued a written decision, reversing the Board and remanding the matter to the Department to issue an order directing Maxim to accept responsibility for acceleration of Ms. Taylor's preexisting asymptomatic right hip degenerative joint disease and the total right hip replacement surgery. CP 63-68. On May 31, 2019, Judge Cooney issued a Judgment and Order with Findings of Fact and Conclusions of Law consistent with the May 6, 2019 written decision and awarding attorney costs and fees to Ms. Taylor. CP 71-75. Maxim timely filed this appeal on July 1, 2019.

B. Statement of Facts

1. Testimony of Kathryn Taylor

Kathryn Taylor is currently 73 years old. CBR 159:20-21. She is a licensed practical nurse who worked for Maxim from 2002 through January 2012, providing in-home care for medically-fragile children and adults. CBR 160:12-22. On November 15, 2011, while bathing a client sitting in a shower chair, Ms. Taylor turned to the left and felt immediate pain that made her fall to her knees. CBR 141:18-25; 141:1-11; 160:23-25;

161:1-5. She was not lifting anything at the time and it was a relatively minor movement. CBR 142:12-16. Ms. Taylor testified that she felt immediate pain from her groin, around her hip and to her low back. CBR 142:23-25; 143:1-6. She testified that she never had any right hip symptoms prior to the November 2011 injury. CBR 169:15-18.

Ms. Taylor had received chiropractic treatment on and off her whole life. CBR 138:6-15. In addition, Ms. Taylor had treated with primary care physician Dr. Hart since 2004. CBR:17-25; 138:1. These records show that prior to 2011, she saw Dr. Hart and her chiropractor for arthritic joint pain and symptoms in her low back and hips. CBR 139:5-25; 140:1-25; 141:1-5. In fact, only four days prior to the industrial injury, Ms. Taylor had sought chiropractic treatment for pain in her right lower back and hips. CBR 169:15-25; 170:1-7.

Ms. Taylor returned to her chiropractor the day after the November 2011 injury, and on November 19, 2011, she was seen at the emergency room for ongoing pain. CBR 162:4-17. Ms. Taylor testified she did not receive further treatment for her right hip until the May 2013 right hip labrum surgery. CBR 143:19-25; 144:1-9.

Following the labrum repair surgery and completion of post-surgery physical therapy, Ms. Taylor returned to work with another employer, Pediatric Home Care. CBR 144:11-25; 145:1-6. In October

2014, while working for Pediatric Home Care, Ms. Taylor suffered another industrial injury. CBR 145:23-25; 146:1-25; 147:1-5. The medical records indicate Ms. Taylor suffered right hip and low back pain as a result of the 2014 injury, although she testified that she only had upper back pain. CBR 147:11-25; 148:1-25; 149:1-21. She filed a workers' compensation claim for the 2014 injury, which was allowed for right sprain/strain of the right hip joint and lower extremity. CBR 149:22-25; 150:1-3, 14-25. At hearing, Ms. Taylor inaccurately testified that she had no new injuries to her right hip between November 15, 2011 and March 17, 2017. CBR 167:6-9.

After the 2014 injury, Ms. Taylor was diagnosed with severe osteoarthritis in both hips. CBR 151:21-25; 152:1-6. On June 22, 2016, she had a left total hip replacement. CBR 165:22-24. On March 17, 2017, she had a right total hip replacement. CBR 167:3-5.

2. Testimony of Scott Shawen, M.D.

Dr. Scott Shawen is a board-certified orthopedic surgeon licensed in Washington. CBR 321:11-13; 324:11-13. He conducted an independent medical exam of Ms. Taylor on September 10, 2016. CBR 326:8-10. In his report, he diagnosed Ms. Taylor with preexisting right hip degenerative joint disease permanently aggravated or lit up by the industrial injury. CBR 331:4-6. However, in his testimony before the Board, Dr. Shawen

was not able to say on a more probable than not basis whether Ms. Taylor's preexisting right hip osteoarthritis was permanently aggravated or lit up by the industrial injury resulting in the need for the total hip replacement. CBR 333:4-17. He was not able to say on a more probable than not basis whether Ms. Taylor's preexisting right hip osteoarthritis was accelerated or aggravated by her right hip arthroscopy resulting in the need for a total right hip replacement. CBR 332:15-18; 333:18-25.

Q: Doctor, on a more probable than not basis, are you able to state that when she turned and twisted her right hip in 2011 that she caused the need for total hip replacement?

A: I am not.

CBR 340:19-22.

Dr. Shawen testified that a hip arthroscopy on an arthritic hip can increase the need for a total hip arthroplasty, but also acknowledged that Ms. Taylor had a total hip replacement on her left hip due to severe degenerative joint disease despite never having arthroscopic surgery on her left hip. CBR 341:7-21. When asked whether Ms. Taylor would have needed a total right hip replacement if the work injury had not occurred, Dr. Shawen could not state whether that would have been the case without pre-injury x-rays showing arthritic change; however, he further testified

that his opinion would change if Ms. Taylor was symptomatic prior to the November 2011 injury. CBR 343:12-23.

3. Testimony of Daniel Schmidt, D.O.

Dr. Daniel Schmidt is a licensed practicing physician in Washington, but not board certified. CBR 364:21-22; CBR 366:3-5. He is not an orthopedic surgeon or an occupational therapist, and has never performed a total hip surgery. CBR 386:11-17. He first started treating Ms. Taylor on November 5, 2014, for her October 2014 injury in which she injured her low back and right hip. CBR 367:1-15. He diagnosed her with lumbar strain, hip strain, osteoarthritis/sciatica. CBR 368:6-7. When Ms. Taylor's October 2014 claim closed in July 2015, Dr. Schmidt began treating her for her November 2011 claim. CBR 372:15-20.

Dr. Schmidt opined that Ms. Taylor's preexisting right hip osteoarthritis was permanently aggravated or lit up by the November 2011 industrial injury, resulting in the need for the total right hip replacement. CBR 378:7-13. However, he did not treat her at all between October 2011 and November 2014, and the only knowledge he had of her 2011 injury and progression of symptoms came from Ms. Taylor and two prior IME reports he reviewed. CBR 379:7-9; 380:13-19. He testified that he thought she was a fairly accurate historian of her symptoms, but when told that she testified that her 2014 injury only caused an upper back/thoracic injury, he

acknowledged that was not accurate. CBR 381:1-15. Dr. Schmidt had no knowledge of the mechanism of injury for the 2011 injury. CBR 383:17-18; 384:17-21. He was not aware that Ms. Taylor was receiving chiropractic treatment for her right hip prior to the 2011 injury. CBR 387:15-17. He agreed that if someone is receiving treatment for a condition four days before an injury, that person is symptomatic prior to the injury. CBR 389:25; 390:1-4. He acknowledged that Ms. Taylor had severe osteoarthritis in both hips, and if she was receiving chiropractic treatment for those joints, it was because she was symptomatic. CBR 396:19-21; 397:3-6. Dr. Schmidt testified that, in December 2014, he thought Ms. Taylor's right hip condition and hip replacement surgery should have been covered under the October 2014 claim because that injury exacerbated her hip condition. He went on to testify that if it was denied under the 2014 claim, he would try to get it covered under her 2011 claim. CBR 406:17-25; 407:1-9. In February 2015, he had recommended Ms. Taylor have a total right hip replacement under her 2014 claim. CBR 407:15-25; 408:1-10.

4. Testimony of Patrick Lynch, M.D.

Dr. Patrick Lynch is a board-certified orthopedic surgeon licensed to practice in Washington. CBR 434:20-22; 435:12-13. Ms. Taylor was first seen at his office in October 2012 by his Physician's Assistant ("PA")

for her right hip. CBR 436:24-25; 437:1-4, 21-24. His PA reviewed an MRI of the right hip, which showed chondromalacia of her right hip and tearing of the labrum. CBR 438:7-11. When Dr. Lynch saw Ms. Taylor in April 2013, he concluded her hip pain was due to arthritis and the labral tear, and recommended a hip arthroscopy. CBR 441:24-25; 442:1-5. He warned that the degenerative arthritis would continue to progress and be a source of pain unaddressed by the surgery. CBR 442:6-10. Dr. Lynch performed a right hip arthroscopy on May 8, 2013. CBR 442:11-12. His post-operative diagnoses were Grade 4 chondromalacia of the acetabular, Grade 3 femoral head, and degenerative superior labral tear. CBR 442:16-25; 443:1-11. Grade 4 chondromalacia is end stage of the wearing of the cartilage. CBR 442:23-25; 443:1.

In December 2014, Dr. Lynch first recommended Ms. Taylor consider a right hip replacement. CBR 447:19-25. In December 2015, he saw her for both hips; the following June, he performed a left hip replacement. CBR 448:6-19. By March 2017, Ms. Taylor had recovered from her left hip replacement and at that time, Dr. Lynch recommended proceeding with a right hip replacement. CBR 449:13-25; 450:1-2. CBR 450:9-14. Ms. Taylor had a total right hip replacement on March 28, 2017. CBR 450:15-16. Dr. Lynch's post-operative diagnosis was osteoarthritis of the right hip. CBR 450:19-20. Dr. Lynch testified that

Ms. Taylor had multiple factors that caused the development of her arthritis and need for a total hip replacement, including the aging process and her November 2011 injury. CBR 450:25; 451:1-21. Dr. Lynch testified that Ms. Taylor had asymptomatic arthritis of the right hip prior to her work injury. CBR 452:19-24. In his opinion, her preexisting right hip osteoarthritis was aggravated and/or rendered symptomatic by the November 2011 work injury on a more probable than not basis, and the work injury accelerated the aging process of her hip necessitating a hip replacement. CBR 453:6-10, 17-24.

On cross-examination, Dr. Lynch acknowledged that he had not reviewed any of Ms. Taylor's prior treatment records or any notes other than his own notes. CBR 454:13-20; 455:4-6. His conclusion that she was asymptomatic prior to the 2011 work injury was based on her own report. CBR 457:23-25; 458:1-4. Dr. Lynch agreed Ms. Taylor's degenerative arthritis continued to progress over the years irrespective of her labral tear. CBR 458:19-25. "Her arthritis was present and would continue to progress had nothing occurred to her." CBR 459:2-3. She would still have ongoing progressive osteoarthritis if the November 2011 had never occurred. CBR 463:2-4. He did not know Ms. Taylor had a 2014 injury to her right hip. CBR 455:7-10. Based on the testimony from Ms. Taylor and

Dr. Schmidt, Dr. Lynch agreed the 2014 injury aggravated her symptomatic preexisting right hip arthritis. CBR 455:12-25; 456:1-6.

5. Testimony of Eric Hofmeister, M.D.

Dr. Eric Hofmeister is a board-certified orthopedic surgeon licensed to practice in the State of Washington. CBR 187:21-22; 189:23-25; 190:1-4. He worked at the Naval Medical Center in San Diego until he retired from the military in June 2016. CBR 192:7-14. Since then he has worked at a workers' compensation clinic just outside of San Diego. CBR 192:15-22. Around January 2014, he started performing independent medical examinations in Washington. CBR 193:1-6. He examined Ms. Taylor twice. CBR 194:2-4. The first examination was on June 26, 2015, for her right hip related to her October 2014 industrial injury. CBR 194:8-13. The second examination was on December 10, 2015, for her right hip in connection with the November 2011 industrial injury. CBR 194:14-23.

As part of his examinations, Dr. Hofmeister reviewed Ms. Taylor's treatment records for both injuries as well as her treatment records that preexisted the 2011 industrial injury. CBR 195:3-25; 196:1-5. He testified that her preinjury records show she sought chiropractic treatment for right hip pain as far back as October 19, 2009. CBR 196:6-25; 197:1-4. Prior to the 2011 injury, Ms. Taylor sought chiropractic treatment every few

months or multiple times per month depending on her symptoms, and about a third of those treatments were for her right hip. CBR 198:15-25; 199:1-25. Four days before the November 2011 injury, she sought chiropractic treatment for right-sided spine, hip, and knee pain. CBR 200:15-25. In addition, Ms. Taylor also treated with Dr. Hart for back and hip pain, and he was prescribing her a narcotic hydrocodone prior to the November 2011 injury. CBR 200:1-14. Ms. Taylor's treatment records prior to the November 2011 injury show that she had chronic and persistent bilateral hip degenerative joint disease with an insidious onset over several years. CBR 201:24-25; 202:1-7. Ms. Taylor sought treatment for her right hip on six separate occasions in the eight months prior to the November 2011 injury. CBR 241:13-19; 242:1-7, 16-22. The medical records show Ms. Taylor had chronic right hip pain for at least two years prior to the November 2011 injury, and she sought treatment for her right hip pain four days prior to the injury. CBR 203:25; 204:1-7.

With regard to the November 15, 2011 industrial injury, Dr. Hofmeister was familiar with the mechanism of injury. CBR 202:18-25; 203:1-6. He testified that the May 2012 right hip MRI showed Grade 4 chondromalacia with complete loss of cartilage and wearing out of the bone, chronic in nature, with no indication that it was caused or worsened by the injury. CBR 205:9-10, 25; 206:1-18. Dr. Hofmeister diagnosed

Ms. Taylor with a right hip strain due to the November 2011 injury. CBR 207:8-11. He concluded the work injury did not proximately cause or permanently aggravate her right hip degenerative joint disease on a more probable than not basis. CBR 207:12-20; 216:13-16. He explained that no radiographic evidence supported the preexisting arthritis being aggravated or worsened by her work injury. CBR 214:8-17.

Dr. Hofmeister further testified that Ms. Taylor's ongoing symptoms after her 2013 surgery related to the degenerative process in her hip, not the 2011 injury, on a more probable than not basis. CBR 208:2-16; 216:13-16. He testified that the May 2013 arthroscopic surgery did not proximately cause the need for Mr. Taylor's subsequent total hip replacement. CBR 215:18-25; 216:13-16. "I think her need for a right total hip replacement was due solely to her ongoing chronic osteoarthritis of her right hip" on a more probable than not basis. CBR 216:9-16. With regard to the November 2011 injury, Ms. Taylor was medically fixed and stable by October 30, 2013. CBR 215:6-17.

6. Testimony of Douglas Porter, M.D.

Dr. Douglas Porter is a board-certified orthopedic surgeon licensed to practice medicine in Washington; he also performs independent medical examinations. CBR 265:11-12; 266:8-17; 267:25; 268:1-2. He has performed hundreds of hip replacement surgeries during the course of his

career. CBR 286:15-19. He conducted an independent medical examination of Ms. Taylor on June 16, 2016. CBR 269:2-6. As part of his exam, he reviewed Ms. Taylor's medical records including records that preexisted her injury. CBR 269:7-16. Dr. Porter testified that on examination, Ms. Taylor appeared to have restrictive motion in both hips, consistent with her bilateral hip arthritis unrelated to the work injury. CBR 274:14-25; 275:1-5. Based on his examination and review of the records, Dr. Porter diagnosed Ms. Taylor with bilateral hip degenerative joint disease unrelated to the industrial injury and with no evidence of aggravation caused by the industrial injury on a more probable than not basis. CBR 276:13-18; 284:19-21. He further concluded the right hip arthroscopy for the osteoarthritis was unrelated to her work injury on a more probable than not basis. CBR 277:13-16; 284:19-21.

Dr. Porter testified that the Grade 4 chondromalacia evidenced in the May 2012 MRI of the right hip is a degenerative process consistent with osteoarthritis that was not proximately caused by the work injury. CBR 282:14-23. Furthermore, "the fact that she had bilateral hip conditions is more evidence that this is a degenerative process involving both of her hips which naturally progresses and worsens over time which this did, and as a result she ended up with bilateral total hip replacements." CBR 282:23-25; 283:1-3. He testified the hip condition had a gradual

onset and progressed bilaterally over the years. CBR 283:22-24; 284:19-21.

V. ARGUMENT

A. Standard of Review

Pursuant to RCW 51.52.140, an appeal under the Industrial Insurance Act lies from the judgment of a superior court as in other civil cases, and ordinary practices in civil cases apply. A superior court's legal determinations are reviewed under an error of law standard. *Energy Northwest v. Harje*, 148 Wn. App. 454, 199 P.3d 1043 (2009). The Court of Appeals also reviews for whether "substantial evidence supports the trial court's factual findings *** and whether the court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). Substantial evidence means "evidence of such a character and substance as to convince an unprejudiced, thinking mind of the truth of that to which the evidence is directed." *Ehman v. Dep't of Labor and Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949) (internal citations omitted). The evidence must be sufficient to convince a rational fact finder that an assertion is true. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177, P.3d 180 (2008).

The Court of Appeals should reverse the Spokane County Superior Court judgment because the judge failed to apply the legal standard for lighting up of a preexisting condition, did not rely on substantial evidence in finding the November 2011 industrial injury rendered the preexisting right hip degenerative condition symptomatic, failed to address the natural progression of the preexisting right hip degenerative condition, incorrectly applied the legal standard for special consideration of the attending physician's opinion, and failed to apply the legal standard for proximate causation between the November 2011 industrial injury and the subsequent right hip replacement surgery.

B. The Superior Court Failed to Apply the Correct Legal Standard for this "Lighting Up" Claim and Made Findings Against the Weight of the Record.

Undisputedly, Ms. Taylor had right hip degenerative joint disease that preexisted her November 2011 industrial injury. Further, Ms. Taylor's need for a total right hip replacement was clearly due to her hip degeneration. The sole question is whether the preexisting right hip degenerative condition was lit up or aggravated by the November 2011 industrial injury resulting in the need for the total right hip replacement. The preponderance of this record supports the Board's finding that it did not. The Superior Court erred in failing to apply the correct legal standard, and substantial evidence does not support its findings that Ms. Taylor's

preexisting right hip degenerative condition was asymptomatic prior to the injury or would not have progressed notwithstanding the injury.

1. The Superior Court did not apply the legal standard.

Under *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939), if an industrial injury “lights up or makes active a latent or quiescent infirmity or weakened physical condition...then the resulting disability is to be attributed to the injury, and not the preexisting condition.” “Lighting up” and aggravation are synonymous terms when used in this context. If a latent or inactive preexisting condition is proximately aggravated by the injury, full responsibility for the resulting condition rests with the employer. However, a preexisting condition is not lit up or aggravated when the weight of the evidence shows the condition was symptomatic before the work injury *or* a naturally progressing condition that would have progressed to symptoms without the injury. *See Zavala v. Twin City Foods*, 185 Wn. App. 838, 860, 343 P.3d 761 (2015); *Austin v. Dept' of Labor & Indus.*, 6 Wn. App. 394, 398, 492 P. 2d 1382 (1971); *Matson v. Dep't of Labor & Indus.*, 198 Wash. 507, 516, 88 P.2d 825 (1939).

Nowhere in the Superior Court’s decision does the standard applicable to establishing an aggravation or lighting up of a preexisting condition appear. The Superior Court jumped ahead to focus on the special

consideration standard, which Maxim addresses separately below. As a result, the judge made a statement that the preexisting degenerative disease was asymptomatic before the injury without identifying the findings supporting that statement, and he provided no discussion whatsoever about whether the preexisting condition would have progressed notwithstanding the injury. In short, the Superior Court failed to apply the legal standard Ms. Taylor had to prove to establish that the 2011 injury lit up her degenerative hip disease. This Court reviews a trial court's application of law for plain error. *Energy Northwest*, 148 Wn. App. 454. The failure to apply the correct standard requires reversal.

2. Ms. Taylor's preexisting right hip degenerative joint disease was symptomatic prior to the November 2011 industrial injury.

In Finding of Fact 15 and Conclusion of Law 3, the Superior Court stated Ms. Taylor's preexisting right hip osteoarthritis was rendered symptomatic by the November 2011 industrial injury. CP 74. In its written opinion the Superior Court stated: "prior to November 15, 2011, Ms. Taylor's right hip was asymptomatic" and "[a]lthough she suffered degenerative joint disease at the time of the industrial injury, her right hip was asymptomatic." CP 67. If a preexisting condition is symptomatic prior to the work injury, it is not considered lit up or aggravated by the work injury, so this factual finding was central to the decision in this case.

Austin, 6 Wn. App. 394, 398; *Zavala*, 185 Wn. App. 838, 862. The appellate court reviews this factual finding for substantial evidence. *Ruse*, 138 Wn.2d 1, 5. The finding went against the weight of the evidence, and the Superior Court did not explain how its conclusion flowed from the evidence. As a result, it lacks substantial evidence.

It appears the Superior Court concluded Ms. Taylor had no right hip symptoms before the November 2011 injury based on the opinion of Dr. Lynch. But as even the Superior Court recognized, Dr. Lynch was uninformed. Dr. Lynch testified he had not reviewed any of Ms. Taylor's prior treatment records. CBR 454:13-20. Based only on the subjective history provided by Ms. Taylor, Dr. Lynch concluded she had asymptomatic arthritis of the right hip prior to her November 2011 industrial injury that was made symptomatic by the work injury. CBR 452:19-24; 453:6-10; 457:23-25; 458:1-4.

While Ms. Taylor testified she did not have any right hip symptoms prior to the November 2011 industrial injury and told the same to Dr. Lynch and Dr. Schmidt, her testimony is not reliable. CBR 169:15-18; CBR 452:19-24; 453:6-10; 457:23-25; 458:1-4. Evidence shows Ms. Taylor's testimony and recall was not accurate, as the Board concluded. CBR 61. For example, Ms. Taylor testified that she had no new injuries to her right hip between November 15, 2011 and March 17, 2017; testimony

from her own medical experts supports she did in fact suffer an injury to her right hip as a result of the October 2014 industrial injury. CBR 167:6-9. Even Ms. Taylor's counsel admitted at trial that she was a poor historian. RP 34.

In contrast, substantial evidence shows Ms. Taylor's right hip was symptomatic and she received treatment for it in the years prior to the November 2011 injury, including four days prior to the November 2011 injury. CBR 241:13-19; 242:1-7, 16-22; 203:25; 204:1-7. Dr. Hofmeister reviewed Ms. Taylor's pre-injury treatment records and had knowledge of her preinjury symptoms and treatment in forming his opinion. He testified that Ms. Taylor's pre-injury treatment records showed she had chronic symptomatic right hip degeneration for at least two years prior to the November 2011 injury. CBR 201:24-25; 202:1-7; 203:25; 204:1-7. He concluded the work injury did not proximately cause or permanently aggravate her right hip degenerative joint disease on a more probable than not basis. CBR 207:12-20; 216:13-16.

Ms. Taylor's medical experts were not aware of her prior right hip symptoms or treatment when forming their opinions. Dr. Schmidt testified he was not aware that Ms. Taylor was receiving chiropractic treatment for her right hip prior to the 2011 injury. CBR 387:15-17. He acknowledged that Ms. Taylor had severe osteoarthritis in both hips and if she was

receiving chiropractic treatment for those joints before the injury, it was because she was symptomatic. CBR 396:19-21; 397:3-6. Dr. Schmidt further agreed that if someone received treatment for a condition four days before an injury, that person was symptomatic prior to the injury. CBR 389:25; 390:1-4. Dr. Shawen, who also lacked information about the prior treatment, directly stated his opinions would change if Ms. Taylor was symptomatic prior to the November 2011 injury. CBR 343:12-23.

“Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (internal citations omitted). When the evidence robustly supports a factual finding, a determination counter to that finding lacks substantial evidence. *Jenkins*, 143 Wn. App. 246. Here, the evidence robustly supports that Ms. Taylor’s preexisting right hip condition was symptomatic prior to the injury. Moreover, Ms. Taylor did not present evidence overcoming the prima facie finding by the Board that her hip was symptomatic prior to the November 2011 injury. *Allison v. Dep’t of Labor & Indus.*, 66 Wn.2d 263, 401 P.2d 982 (1965). The Superior Court’s finding otherwise goes against the weight of evidence and cannot be sustained. The Court should reverse the finding and find Ms. Taylor’s preexisting right hip degenerative condition was

symptomatic at the time of the November 2011 industrial injury, and hence, she did not establish her preexisting right hip condition was lit up or aggravated by the industrial injury.

3. Ms. Taylor's preexisting right hip degenerative joint disease would have continued to progress regardless of the November 2011 industrial injury.

In its Finding of Fact 15 and Conclusion of Law 4 the Superior Court stated the November 2011 industrial injury accelerated the aging process of Ms. Taylor's preexisting right hip osteoarthritis. CP 74. As argued above in III.B.1 *infra*, the Superior Court failed to address the natural progression of the preexisting right hip degeneration as required under *Miller, Austin* and *Zavala*. To reach the conclusion that the injury accelerated the aging process, the Superior Court ignored the weight of the evidence.

Even if the court disregards the medical evidence showing Ms. Taylor's right hip was symptomatic for years prior to and up to four days before the November 2011 industrial injury, her preexisting right hip condition was still not aggravated by the industrial injury because it is a naturally progressing degenerative condition that would have continued to progress regardless of the industrial injury. *See Austin*, 6 Wn. App. 394. The medical evidence shows Ms. Taylor had Grade 4, or end stage, osteoarthritis of her right hip, meaning she had complete loss of her

cartilage and wearing out of the bone. CBR 205:25; 206:1-8; 442:16-25; 443:1-11. She was in the final stage of a degenerative disease and the experts all agree this disease would progress regardless of injury.

Dr. Lynch, Ms. Taylor's attending physician, testified that her right hip degenerative arthritis would have continued to progress over the years irrespective of the labral tear following the November 2011 injury. CBR 458:19-25. "Her arthritis was present and would continue to progress had nothing occurred to her." CBR 459:2-3. He further stated she would still have ongoing progressive osteoarthritis if the November 2011 had never occurred. CBR 463:2-4. Dr. Hofmeister, one of only two physicians to have reviewed Ms. Taylor's pre-injury treatment records, testified that her pre-injury records showed she had chronic and persistent bilateral hip degenerative joint disease with an insidious onset over several years. CBR 201:24-25; 202:1-7. Ms. Taylor testified she has severe osteoarthritis in both hips and has had bilateral total hip replacements. CBR 151:21-25; 152:1-6; 165:22-24; 167:3-5. As noted by Dr. Porter, "the fact that she had bilateral hip conditions is more evidence that this is a degenerative process involving both of her hips which naturally progresses and worsens over time which this did, and as a result she ended up with bilateral total hip replacements." CBR 282:23-25; 283:1-3. He testified that the hip condition had a gradual onset and progressed over the years in both hips.

CBR 283:22-24; 284:19-21. Further, Ms. Taylor’s “need for a right total hip replacement was due solely to her ongoing chronic osteoarthritis of her right hip” on a more probable than not basis. CBR 216:9-16.

The medical experts agreed Ms. Taylor’s preexisting right hip osteoarthritis is a degenerative condition. Substantial evidence supports the condition as naturally progressing prior to the industrial injury, and would have continued to progress resulting in the need for a total hip replacement, regardless of the November 2011 industrial injury. The Superior Court erred in failing to address the natural progression of the preexisting condition, and ignoring the substantial evidence that the right hip condition would have progressed regardless of the injury. This independently requires reversal.

C. The Superior Court Erred in Its Application of the Rule Requiring Special Consideration for the Attending Physician’s Opinion.

In its Finding of Fact 16 the Superior Court stated that, as the attending physician, Dr. Lynch’s testimony should be given special consideration, but in its written opinion the court incorrectly applied the legal standard. In reaching its findings and conclusions, the Superior Court relied almost solely on the opinion of Dr. Lynch and criticized the Board for not granting “adequate weight to the testimony of Dr. Lynch”. CP 66. As Maxim argued at trial, the special consideration rule requires attention,

but the Board correctly found the attending physicians could not be relied upon due to lack of information. RP 21, 22. It was the Superior Court, not the Board, that applied the standard incorrectly.

For industrial injury claims, an attending physician's opinion is afforded "special consideration." Special consideration means the testimony of the attending physician is entitled to careful thought, not that it should be given greater weight or credibility. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988) (citing *Groff v. Dep't of Labor & Indus.*, 65 Wash.2d 35, 45, 395 P.2d 633 (1964)). The reasoning behind the rule is that a qualified treating physician who sees a patient over a substantial period of time is better qualified to give opinions than a doctor who examined a patient once. *Spalding v. Dep't of Labor & Indus.*, 29 Wash.2d 115, 128-29, 186 P.2d 76 (1947). But the special consideration rule does not require a court to disregard evidence that contradicts the attending physician. *Chalmers v. Dep't of Labor & Indus.*, 72 Wn. 2d. 595, 434 P.2d 720 (1967). Here, in giving more weight and credibility to Dr. Lynch's testimony, the Superior Court did not correctly apply the legal standard. Its misapplication of the rule led to a conclusion that lacks substantial evidence.

The Superior Court noted: "In reaching his conclusions, Dr. Lynch did not review a substantial amount of Ms. Taylor's documented medical

history.” CR 65. And yet, it found “Dr. Lynch’s testimony should have been given greater weight rather than an expert who may have been most informed yet less qualified.” CR 67. This misconstrues the special consideration rule as requiring more weight rather than just giving careful thought. In *Chalmers*, the Washington Supreme Court addressed a similar scenario. There, a qualified attending physician tied a worker’s chemical exposure to a disease. However, witness testimony established that the chemical had not been used in the time period in question. Nonetheless, the Superior Court held that the Board had to accept the testimony of the attending physician under the special consideration rule. Noting that the doctor based his opinion on erroneous information, and noting the Board’s factual findings are prima facie correct, the Supreme Court reversed. *Id.* at 602-03.

Similarly here, the Superior Court acknowledged Dr. Lynch did not have a substantial amount of the medical record. It concluded that Dr. Lynch was more qualified than the other medical experts based on the amount of hip replacement surgeries he has performed. CP 67. However, Dr. Lynch’s qualifications as a hip surgeon does not put him in a better position to assess causation when he had incomplete information regarding her medical history. The Board below noted that attending physicians were to be given special consideration, but explained that they

did not have pre-injury treatment records and relied on Ms. Taylor – an unreliable historian. The Board found her hip was symptomatic before the injury. CBR 61. As a result, the Board also found Dr. Lynch and Dr. Schmidt did not rely on accurate information. CBR 61. The Superior Court did not cite any evidence from Ms. Taylor that overcame the presumption that these findings by the Board were correct. As in *Chalmers*, the special consideration rule does not warrant reliance on an attending physician with expertise but inaccurate facts.

While Dr. Lynch’s opinion may be entitled to special consideration, the Superior Court erred in applying that rule. Its decision to give Dr. Lynch’s testimony more weight than the testimony of the other, more informed, medical experts goes against the weight of the evidence. Maxim requests the Court reverse the Superior Court with instructions to reinstate the findings and decision of the Board.

D. Proximate Cause was Not Established Between the November 2011 Industrial Injury and the Subsequent Right Hip Replacement Surgery.

In its Conclusion of Law 4, the Superior Court stated the November 2011 industrial injury was the proximate cause of Ms. Taylor’s need for a total right hip replacement surgery. CP 74. However, this conclusion is not supported by substantial evidence.

To be compensable under a workers' compensation claim, a condition must be proximately caused by the industrial injury or occupational disease. The term "proximate cause" means a cause in a direct sequence, unbroken by any new independent cause, produces the condition and without which, it would not have happened. *Wendt v. Department of Labor & Indus.*, 18 Wn. App. 674, 571 P.2d 229 (1977). Proximate cause includes both cause in fact and legal causation. *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 142, 727, P.2d 655 (1986). "Cause in fact concerns but for causation, events the act produced in a direct unbroken sequence which would not have resulted had the act not occurred." *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999). In other words, causation must be proximate in the sense that there is no intervening cause; but for the work injury the subsequent condition would not have occurred. See *Simpson Logging Co. v. Dep't. of Labor & Indus.*, 32 Wn.2d 472, 202 P.2d 448 (1949). The causal connection between an industrial injury and a condition must be established by expert testimony. *Stampas v. Dep't of Labor & Indus.*, 38 Wn.2d 48, 227 P.2d 739 (1951).

The question in this case is whether the causal chain between the November 2011 industrial injury and the subsequent right hip replacement surgery was broken by the October 2014 injury. In other words, did the

October 2014 injury constitute an intervening cause? The Superior Court failed to address whether Ms. Taylor's October 2014 industrial injury constituted an independent intervening cause breaking the chain of causation between the November 2011 injury and her subsequent need for a total right hip replacement.

Ms. Taylor testified that she had no new injuries to her right hip between November 15, 2011, and March 17, 2017, the date of her total right hip replacement; but testimony from her own medical experts supports she did in fact suffer an injury to her right hip as a result of the October 2014 industrial injury. CBR 167:6-9. Dr. Schmidt testified that in December 2014, he thought Ms. Taylor's right hip condition and hip replacement surgery should have been covered under the October 2014 claim since that injury exacerbated her hip condition; however, he went on to state if it was denied under the 2014 claim, he would try to get it covered under her 2011 claim. CBR 406:17-25: 407:1-9. In February 2015, he recommended Ms. Taylor have a total right hip replacement under her 2014 claim. CBR 407:15-25: 408:1-10. Dr. Lynch did not know Ms. Taylor had a 2014 right hip injury. CBR 455:7-10. However, based on the testimony from Ms. Taylor and Dr. Schmidt, Dr. Lynch agreed the 2014 injury aggravated her symptomatic preexisting right hip arthritis. CBR 455:12-25; 456:1-6. Ms. Taylor's own medical experts agree the

October 2014 injury was an intervening cause that aggravated her preexisting right hip degenerative condition. Based on substantial evidence, this broke the cause in fact chain between the November 2011 injury and Ms. Taylor's subsequent total right hip replacement. The Superior Court erred in failing to address the October 2014 injury as an intervening cause. This also warrants reversal.

VI. CONCLUSION

The Superior Court failed to correctly apply the law and made factual findings and conclusions unsupported by substantial evidence. Ms. Taylor's preexisting right hip degenerative condition was symptomatic at the time of the November 2011 industrial injury, and was a naturally progressing condition that would have continued to progress regardless of the November 2011 injury. The Superior Court failed to apply this standard correctly, and made factual findings – such as finding Ms. Taylor asymptomatic before the injury – that do not have substantial support in the record.

Instead, the Superior Court adopted Dr. Lynch's opinion based on a misapplication of the special consideration rule, when Dr. Lynch lacked the information needed to consider if the preexisting condition had been aggravated. The Superior Court did so despite prima facie findings by the Board and the lack of evidence from Ms. Taylor rebutting those findings.

As a result, the Superior Court erringly found the November 2011 injury permanently aggravated Ms. Taylor's preexisting hip disease and found Maxim responsible for the right hip arthroplasty. Based on the foregoing points and authority, Maxim respectfully requests the judgment of the Superior Court be reversed, and the Order of the Board be reinstated.

Dated: November 6, 2019

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Rebecca A. Watkins', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I efiled a copy of
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Courts portal on the following:

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